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No. 209

In the Supreme Court of the United States

OCTOBER TERM, 1962

E. STANLEY RICHARDSON, ET AL., EXECUTORS OF THE ESTATE OF GERTRUDE ROMMEL WILSON, PETITIONERS

v.

FRANCIS R. SMITH, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. 13a–15a)[1] is reported at 196 F. Supp. 432. The *per curiam* opinion of the court of appeals (Pet. 21–23) is reported at 301 F. 2d 305.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1962 (Pet. 21). A petition for rehearing was denied on May 4, 1962 (Pet. 24). The peti-

[1] "R.—" references are to the appendix to taxpayers' brief in the court of appeals. "Supp. R. —" references are to the government's brief in the court of appeals.

tion for a writ of certiorari was filed on June 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Collector sent and taxpayers received a letter requesting payment of an estate tax deficiency of $19,107.84 plus interest of $3,333.14. On the day they received the letter, taxpayers drew a check in the exact amount requested and mailed it without protest or explanation to the Collector who received the remittance on April 1, 1946. Thereafter, on April 30, 1946, the Commissioner signed an assessment of the tax. On April 8, 1949, taxpayers filed a claim for refund of the amount paid. Section 910 of the Internal Revenue Code requires that a claim for refund of a tax "alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax." The questions presented are:

1. Whether the courts below properly held that "payment" of the tax occurred on April 1, 1946, the day the remittance was received by the Collector.

2. Whether a receipt for this payment which was mailed to the taxpayers and which showed both the dates April 1, 1946, and April 10, 1946, estops the United States from asserting that April 1, 1946, was the date of payment.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 910):

> SEC. 910. PERIOD OF LIMITATION FOR FILING CLAIMS.

> All claims for the refunding of the tax imposed by this subchapter alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund.

Treasury Regulations 105 (1939 Code):

> SEC. 81.77 *Payment by check.*—Collectors may accept uncertified checks in payment of the tax, provided such checks are collectible at par, that is, for the full amount, without any deduction for exchange or other charges. The collector will stamp upon the face of each check before deposit thereof the words "This check is in payment of an obligation to the United States and must be paid at par. No protest." This should be followed by his name and title. The day on which the check is received will be considered the date of payment so far as the taxpayer is concerned, unless the check is returned dishonored. * * *

* * * * *

STATEMENT

On May 1, 1943, the taxpayers, executors of the estate of Gertrude Rommel Wilson, filed a federal estate tax return for the estate of their decedent (R. 3a, 13a). The return showed a federal estate tax due in the amount of $4,062.93, which amount was paid to the Collector at the time the return was filed (R. 3a, 13a).

In the early part of 1946, the estate tax return was examined by an agent of the Commissioner (R. 4a). The agent's report proposed a net deficiency against the estate of $19,107.84 (R. 4a). On February 25, 1946, the taxpayers signed an official waiver[2] which authorized immediate assessment and collection of the deficiency in the sum of $19,107.84, plus interest, and provided that the running of interest on the deficiency would terminate 30 days after the filing of the waiver or on the date of assessment, whichever is earlier (R. 4a, 19a). On March 25, 1946, the Collector mailed a form letter to the taxpayers requesting payment in the amount of the net deficiency recorded in the waiver ($19,107.84), plus interest ($3,333.14) computed to March 28, 1946 (R. 4a, 13a, 19a). The Collector's letter stated (R. 20a) (emphasis added):

> This office has received from the Internal Revenue Agent in Charge, together with the related documents, your agreement consenting to the immediate assessment of an estate tax deficiency, with respect to the above-named estate, amounting to $19,107.84.
>
> Interest has accrued on this deficiency at 6 percent per annum from fifteen months from the date of death to thirty days from receipt of the waiver.
>
> The interest has been figured in this case to March 28, 1946 and amounts to $3,333.14.

---

[2] Absent a waiver, Section 871(a) of the 1939 Code (26 U.S.C. 1952 ed., 871(a)), barred the Commissioner from assessing a deficiency or bringing proceedings for its collection until 90 days after the mailing of a formal notice of deficiency to the taxpayer.

It is requested that you return the enclosed copy of this letter with your remittance, covering both the tax and interest. No further interest is due.

Upon receipt of this letter the taxpayers drew a check dated March 28, 1946, for the exact amount requested ($22,440.98), and mailed it, without explanation and without any indication that they did or did not agree with the claimed deficiency, to the Collector (Pet. 22; R. 14a). The district court found that at the time the size of the estate and the amount of the tax depended on the outcome of claims of creditors and the size of an interest in another decedent's estate and that the executors consequently did not agree that the claimed deficiency was correct (R. 13a–14a).

The Collector received the check on April 1, 1946 (R. 4a, 14a). Subsequently, by transmittal letter dated April 10, 1946, the Collector sent the taxpayers a duplicate receipt acknowledging "payment" (R. 4a, 14a, 17a). Under "AMOUNT PAID" the receipt showed "$22,440.98" plus the date "4–1–46" (R. 17a). It also carried the following, which had been stamped below the words "COLLECTOR'S PAID STAMP" (R. 17a):

> Re'd with Remittance
> April 10, 1946
> Coll. Int. Rev.
> 1st Dist. Pa.
> Gimbel Bldg. Phila.

The $22,440.98 remittance was credited to a tax account set up for the estate (R. 24a). Thereafter, on April 30, 1946, the Commissioner signed an assessment

for the dollar amount of the deficiency and interest (R. 5a, 6a). Contemporaneously with the signing, the deficiency and interest were removed from the estate account and credited to a suspense account. Eight days later, on May 8, 1946, they were returned to the estate account (R. 5a–6a, 24a, 25a, 29a, 31a; Supp. R. 5b–10b).[1]

On April 8, 1949, taxpayers filed with the Internal Revenue Service a claim for refund of $22,440.98 plus interest (R. 6a–7a, 14a, 32a). By letter dated June 30, 1952, a representative of the Commissioner notified the taxpayers that no further consideration would be given to their claim for refund for the reason that it was not timely filed (R. 7a, 18a). On or about June 24, 1954, the taxpayers commenced the instant action for refund (R. 1a). In a separate trial of the statute-of-limitations issue (R. 1a), the district court, relying on *Hill* v. *United States*, 263 F. 2d 885 (C.A. 3), held that payment took place no later than April 1, 1946 (R. 13a–15a). The court stated (R. 15a):

> The principle of the *Hill* case would seem to be that if a taxpayer *without explanation* sends a check with an estate tax return, in an amount

[1] The temporary removal of the funds from the estate account was apparently necessitated by the need to take the case up ahead of the normal schedule in order to complete formal assessment by May 1, 1946, the last date for such action under the three-year limitations period set by Section 874(a) of the 1939 Code (26 U.S.C. 1952 ed., 874(a)) for such action by the government. (See R. 5a, 27a.) Had early action on the assessment not been necessary, it is apparent that the moneys would have remained from the date of their receipt in the estate account.

> corresponding to the tax indicated on the return, without some accompanying statement clearly indicating a contrary intent, that remittance constitutes payment of the tax indicated on the return. It would seem to follow from this that where a revenue official makes a written request for a specific amount of tax and interest and the taxpayer promptly sends a check for that exact amount, without some accompanying statement clearly indicating a contrary intent, that remittance constitutes payment of the tax and interest requested. The remittance so made in this case constitutes payment, and since the claim for refund was filed more than three years thereafter, it is barred by § 910.

The court of appeals affirmed *per curiam* (Pet. 21–22), finding (Pet. 22) "no difference in principle" between this case and *Hill*. The court also rejected petitioners' argument that the April 10 date shown on the receipt estopped the United States from claiming that the payment occurred on April 1.

ARGUMENT.

1. The decision below is correct. There is no conflict, and the case presents no question warranting further review.

Section 910 of the Internal Revenue Code of 1939, *supra*, pp. 2–3, provides that a claim for refund of an estate tax "alleged to have been erroneously or illegally assessed or collected must be presented to the

Commissioner within three years next after the payment of such tax" and the "amount of refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim * * *." Giving those words their ordinary meaning, *Rosenman* v. *United States*, 323 U.S. 658, 661, the Commissioner and the courts below were plainly warranted in finding that the payment occurred on April 1, 1946, when the taxpayers' check was received by the Collector. The tax obligation had been defined. Thus, the waiver which the taxpayers signed gave them official notice of the amount of the deficiency claimed and their liability for interest to March 28, 1946, or the date of assessment, whichever was earlier. Thereafter, petitioners received from the Collector a formal, written request for payment of the exact dollar amount of the deficiency plus interest computed to March 28, 1946. On the same day, they forwarded a check in that amount to the Collector from whom they had received the request. They made no protest and neither disclaimed liability nor disputed the amount due.[4]

---

[4] There was no reason for the Commissioner or the courts below to consider that the remittance was, as petitioners contend, "a voluntary deposit of funds with the Collector in anticipation of an expected assessment, to be applied against that assessment when made, thereby preventing the accumulation of further interest" (Pet. 14). There was no cause for such a voluntary deposit for the waiver stopped the accumulation of interest on March 28, 1946 (see Statement, *supra*).

Nor is there any basis in the record for the inferences which petitioners draw from the fact that the payment was held in a suspense account for eight days from April 30 to May 8, 1946.

The check had the legal effect of "payment" in that it satisfied and discharged the asserted tax liability and left the taxpayers with an immediate right to sue for refund. *Rosenman* v. *United States*, *supra*, at 662; *Lewyt Corp.* v. *Commissioner*, 215 F. 2d 548, 522-523, 527-528 (C.A. 2), affirmed in part and reversed in part, 349 U.S. 237; *Hill* v. *United States*, 263 F. 2d 885 (C.A. 3).

Taxpayers argue that the payment did not occur until the assessment was signed by the Commissioner on April 30, 1946 (Pet. 9, 12). In making this argument, they rely on *Rosenman* v. *United States*, *supra*, and *Thomas* v. *Mercantile Nat. Bank of Dallas*, 204 F. 2d 943 (C.A. 5), with which they claim the decision below is in conflict (Pet. 9). However, neither those cases nor the statute make an assessment a necessary pre-condition to "payment," either generally or in the situation presented here. Section 910 speaks of a claim for refund of a tax "alleged to have been erroneously or illegally assessed *or collected*" (emphasis added). "Congress has evidently meant what these words ordinarily convey" (*Rosenman* v.

Contrary to their assertion that the action shows that the Collector received and treated the payment as a voluntary deposit in anticipation of an expected assessment, the record indicates that the transfer to the suspense account was necessitated by the internal bookkeeping required to permit completion of the assessment prior to the expiration of the statute of limitations covering such actions by the government. The transfer was made at the request of the Commissioner (R. 27a) and had nothing to do with his judgment whether the remittance was a "deposit on account" rather than a "payment". See Statement, *supra*, p. 6, n. 3.

United States, *supra*, at 661) and they leave no doubt that an assessment is not required.

In fact, petitioners concede that a tax may be paid without assessment, as when a remittance accompanies a return or where a taxpayer expressly admits liability (Pet. 12–13). The argument here is that in the absence of a return or an express admission of liability, a payment cannot occur until assessment. However, neither *Rosenman* nor *Mercantile Nat. Bank* stands for such a limited rule. In both cases the courts found that the date of assessment began the three-year period although the taxpayers had paid over the sums which were the subject of the refund claims prior to assessment. Nonetheless, the holdings rest on the particular facts presented, which differ materially from those at issue here.

Here, the facts show that the government had plainly asserted the liability in a stated sum, had officially requested payment in that amount, had received a check in that sum from the taxpayers in immediate response to the request and had treated the check as a payment of the deficiency. In *Rosenman* there had been no definition of the tax obligation prior to the time of the remittance. Because the tax became due on December 25, 1934, while the time for filing the estate tax return had been extended to February 25, 1935, the taxpayers there delivered a check for $120,000 on December 24. In a letter of transmittal accompanying the check the taxpayers advised that it was a payment on account "made under protest and duress, and solely for the purpose of avoiding penal-

ties and interest * * *" (*Rosenman v. United States*, *supra*, at 660). The Court found that the taxpayer did not discharge what he deemed a liability nor pay one that was asserted (*id.* at 662), and held that a subsequent "erroneous assessment" some three years later gave rise to the claim for refund.

In *Thomas v. Mercantile Nat. Bank*, *supra*, the taxpayers forwarded a check prior to assessment and after an internal revenue agent proposed a deficiency. The record indicates no formal request by the Collector for payment of a stated amount plus interest, as there was here. Moreover, the court found that the remittance was intended "to forestall the accrual of interest on any deficiency" and was "merely an advance deposit" and not for the satisfaction of a tax liability (*id.* at 943, 944). Here, on the other hand, one of the taxpayers testified that he knew exactly how much the government was claiming, that the liability had been defined (Supp. 1b–3b) and that he figured the date upon which the refund should be filed from the date upon which he incorrectly believed the Collector had received the check; not the date of assessment (R. 10a).

The difference in the results reached by the two courts below and in *Rosenman* and *Mercantile Nat. Bank* stems not from a conflict in the interpretation of the statute but from these differences in the facts presented. This is a matter appropriately left to the judgment of the trial court and, following review and affirmance by the court of appeals, clearly does not warrant further review by this Court.

2. Taxpayers' alternative contention that their reliance on the April 10, 1946, date stamped on the receipt for payment estops the government from asserting that payment occurred on April 1 presents no general question warranting review by this Court. It turns wholly on the facts of this case, and in any event, is without merit.

Estoppel is not ordinarly applied against the United States (*Wilber Nat. Bank* v. *United States*, 294 U.S. 120, 123; *Goldstein* v. *United States*, 227 F. 2d 1, 4 (C.A. 8); *Walker-Hill Co.* v. *United States*, 162 F. 2d 259, 263 (C.A. 7), certiorari denied, 332 U.S. 771), and the facts of this case present no occasion for an exception to that rule. At most the receipt was ambiguous since, in addition to the April 10 date, it showed that the payment was received on April 1 (R. 17a; see Statement, *supra*). The pertinent Treasury Regulations, Section 81.77, *supra*, advise that the date the check is received by the Collector is the date of payment and since taxpayers mailed the check in Philadelphia on March 28, 1946, they should have expected the Collector to receive the check on April 1, not April 10. Further, the taxpayers had ample opportunity after receiving the receipt to resolve the ambiguity in the two dates and by their failure to do so are properly chargeable with any prejudice which resulted from it. A party knowing the facts or in a position to know them cannot claim the benefit of estoppel. *Hull* v. *Commissioner*, 87 F. 2d 260, 262 (C.A. 4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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